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No. 05-1481

IN THE

Supreme Court of the United States

SIDLEY AUSTIN LLP,

Petitioner,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a not-for-profit corporation that has neither a parent nor stockholders.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest federation of businesses, representing an underlying membership of more than three million businesses and organizations, with direct members of every size in every industrial sector and geographic region of the country. A principal function of the Chamber is to advocate the interests of the business community in courts across the Nation by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses. The Chamber has participated as *amicus curiae* in numerous cases before this Court and the federal courts of appeals that have raised issues of vital concern to the Nation's businesses, including several cases that have addressed federal anti-discrimination laws and the United States Equal Employment Opportunity Commission. *See, e.g., Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004); *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003); *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304 (10th Cir. 2005).

The Chamber has long been a strong advocate of national uniformity in federal law. The predictability engendered by a uniform federal legal scheme promotes efficient business operations, especially in the area of employer/employee relations, and protects businesses against the costs and risks of navigating a maze of inconsistent federal laws.

The question presented in this case—namely, whether conduct by individuals that bars them from obtaining individual relief under the federal anti-discrimination laws similarly bars the Equal Employment Opportunity Commission ("EEOC") from obtaining individual relief on their behalf—directly implicates the Chamber's interest in a

predictable and uniform federal legal scheme. Because the Seventh Circuit's decision, which is in conflict with decisions of other courts of appeals, *see Vines v. Univ. of La.*, 398 F.3d 700, 707 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1019 (2006); *EEOC v. W.H. Braum, Inc.*, 347 F.3d 1192, 1201-02 (10th Cir. 2003); *EEOC v. United States Steel Corp.*, 921 F.2d 489, 496-97 (3d Cir. 1990) (Alito, J.); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987); *EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1011 (6th Cir. 1975), will have far-reaching and disastrous implications for countless businesses that depend upon the certainty, predictability, and uniformity of federal law, the Chamber and its members have a strong interest in the Court granting plenary review and correcting the erroneous judgment of the court below.[1]

SUMMARY OF ARGUMENT

As the petition explains, the traditional reasons for granting certiorari are clearly present here: The decision below implicates a well-developed split among the federal courts of appeals concerning an important and recurring question of federal law. But, *amicus* wishes to highlight additional reasons why it is important for this Court to grant certiorari, and to grant it now.

This case poses the important question whether conduct by individuals that bars them from obtaining individual relief under the federal anti-discrimination laws similarly bars the EEOC from obtaining individual relief on their behalf. Specifically, the question before this Court is whether the EEOC may recover individual-specific relief under federal anti-discrimination laws, where, as here, no individual or

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the Chamber, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief, and their consent letters are on file with the Clerk's Office.

entity filed a timely charge of discrimination. The court below, plainly misapprehending and vastly expanding this Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), held that the EEOC's right to seek recovery on behalf of individuals is in no way "derivative of the legal rights of [those] individuals even when it is seeking to make them whole." Pet. App. 2a. In reaching this conclusion, the Seventh Circuit averred that "the doctrinal heart of *Waffle House*" is that "the EEOC is not in privity with the victims for whom it seeks relief." Pet. App. 3a. As such, the lower court found that an individual's "procedural forfeiture"—a failure to exhaust remedies in this case—does not bar the EEOC from pursuing his case, because "the *Commission* had no duty to exhaust." Pet. App. 2a. Thus, the court below held that the EEOC could seek individual relief on behalf of a group of lawyers who chose never to file charges with the EEOC, even though the lawyers themselves would be barred from seeking such relief on their own behalf. *Id.*

The Seventh Circuit's erroneous and expansive reading of *Waffle House*, coupled with the EEOC's sweeping assertion of limitless enforcement authority, will undermine the ability of countless businesses to amicably resolve litigation through well-established settlement policies. Should the decision below stand, employers and employees will be stripped of their expectation interest in finality achieved through settlement agreements or other judgments. Furthermore, the Seventh Circuit's misguided conclusion that the EEOC is never "in privity with the victims for whom it seeks relief," Pet. App. 3a, will undermine the explicit purpose of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 626(b), to facilitate the informal settlement of age discrimination claims between employers and employees without resort to litigation.

Because the decision below will frustrate the settlement practices of numerous businesses, this Court should grant review to define precisely the scope of *Waffle House* and to prevent the inevitable uncertainty and harm that businesses will suffer should the Seventh Circuit's holding stand.

ARGUMENT

I. THE DECISION BELOW WILL UNDERMINE THE ABILITY OF BUSINESSES IN NUMEROUS INDUSTRIES TO AMICABLY RESOLVE LITIGATION THROUGH SETTLEMENT NEGOTIATIONS

Review of the Seventh Circuit's decision is essential. Without this Court's immediate intervention, the expansive interpretation of *Waffle House* advocated by the EEOC and adopted by the Seventh Circuit will adversely affect the national business environment by undermining the certainty and finality that is essential to the fair and expeditious resolution of employment discrimination claims.

1. In *Waffle House*, this Court held that an agreement between an employer and an employee to arbitrate an employment-related dispute in a particular arbitral forum did not bar the EEOC from pursuing individual-specific judicial relief, such as backpay, reinstatement, and damages, in a federal court enforcement action brought pursuant to § 107(a) of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12117(a), and § 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. 534 U.S. at 283-98. The Court reached this conclusion because nothing in the Federal Arbitration Act ("FAA")—which governed the dispute between the parties—authorizes a court to compel the arbitration of any issues, or by any parties, that are not covered in the agreement. *Id.* at 289. Since the EEOC was not a party to the arbitration agreement at issue in *Waffle House*, this Court held that the EEOC was not barred by the parties' agreement from pursuing individual-specific relief in federal court. *Id.* at 297-98.

The limited nature of this Court's holding in *Waffle House* is plain, and *Waffle House*'s inapplicability to the present dispute is evident in this Court's specific admonition that

> no question concerning the validity of [the employee's] claim or the character of the relief that could be appropriately awarded in either a judicial or an arbitral forum is presented by this record. . . . *It is an open question* whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek.

Id. at 297 (emphasis added).

Given the Court's acknowledgment that an individual's "conduct may have the effect of limiting the relief that the EEOC may obtain in court," *id.* at 296, *Waffle House* simply cannot be read as affirmatively holding that the EEOC is *never* in privity with individuals on whose behalf it seeks relief. Rather, *Waffle House* decided that where an employee enters into a contract selecting the *forum* for suit, then, in those cases, the EEOC is not *contractually bound* by that choice of forum and may pursue individual-specific claims in federal court. *See id.* at 295 (stating that because the EEOC vindicates the public interest even when it seeks victim-specific relief, "the EEOC has the authority to pursue victim-specific relief regardless of the *forum* that the employer and employee have chosen to resolve their disputes") (emphasis added); *see also id.* at 298 (stating that "the statute specifically grants the EEOC exclusive authority over the choice of *forum* and the prayer for relief once a charge has been filed") (emphasis added).

In other words, the only question before this Court in *Waffle House* was whether an employee's *choice of an arbitral forum* for litigating his *private* claims was contractually binding on the EEOC when it seeks

individual-specific relief in a public enforcement action.[2] *Waffle House* thus reserved the general question of whether the EEOC can obtain relief on behalf of individuals that would be barred if sought by the individuals themselves. *Id.* at 297-98.

2. The Seventh Circuit has, at the EEOC's urging, adopted an erroneous and expansive reading of *Waffle House*. According to the Seventh Circuit, "the Commission was not bound by [the arbitration clause at issue in *Waffle House*] because its enforcement authority is not derivative of the legal rights of individuals even when it is seeking to make them whole," and, therefore, "the Commission is not bound by the failure of the Sidley ex-partners to exhaust their remedies; the *Commission* had no duty to exhaust." Pet. App. 2a. The Seventh Circuit thus believed that the "doctrinal heart of *Waffle House*" was that the EEOC is

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[2] Even the EEOC acknowledged this understanding of the case:

> This case *does not present* any question regarding the effect of a prior private settlement or judgment between employer and employee on a later public enforcement action. The availability of relief in such cases would require resolution of questions concerning whether victim-specific relief would result in a double recovery, whether victim-specific relief is 'appropriate' under 42 U.S.C. 2000e-5(g)(1) after the victim has satisfied his own claim through litigation or settlement, and whether principles of res judicata would bar an award of victim-specific relief under a particular statutory scheme and set of facts. . . . In this case, [the employee] has neither litigated nor settled his individual claim. Accordingly, the question presented is *not* one of res judicata or mootness, but rather whether [the employee's] mere *choice of an arbitral forum* for litigating his private claims is binding on the EEOC when it seeks victim-specific relief in a public enforcement action.

Brief for the Petitioner at 38 n.13, *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (No. 99-1823) (emphases added). In sum, not even the EEOC believed that the Court in *Waffle House* was speaking to the issue now presented in this case.

never "in privity with the victims for whom it seeks relief," Pet. App. 3a, and that *Waffle House* therefore "scuttled" existing caselaw on this general issue, Pet. App. 2a.

3. The Seventh Circuit's erroneous and expansive reading of *Waffle House* has far-reaching implications for businesses in numerous industries. Indeed, in light of the EEOC's effort to use *Waffle House* to vastly expand its regulatory reach, it is clear that the Seventh Circuit's broad holding will undermine the ability of businesses and employees to reach amicable resolutions in thousands of employment discrimination claims.

Before *Waffle House*, the EEOC made clear that in cases where "an individual[,] who has signed a waiver agreement or otherwise settled a claim[,] subsequently files a charge with the Commission based on the same claim, the employer *will be shielded* against any further recovery . . . whether the EEOC *or* the private individual brings a subsequent action." U.S. Equal Employment Opportunity Comm'n, Enforcement Guidance on Non-waivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes (Apr. 10, 199) ("EEOC Enforcement Guidance"), *available at* http://www.eeoc.gov/policy/docs/waiver.html (last visited July 20, 2006) (emphases added). As the EEOC explained to this Court, the "courts of appeals have relied on principles of res judicata (in litigated or arbitrated cases) or mootness (in settled cases) to bar the EEOC from obtaining victim-specific relief after litigation or settlement of the victim's claims." Brief for the Petitioner at 38 n.13, *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (No. 99-1823). In *Waffle House*, the EEOC thus specifically told this Court that "[t]his case *does not* present any question regarding the effect of a prior private settlement or judgment between employer and employee on a later public enforcement action." *Id.* (emphasis added). In short, both before and during *Waffle House*, the EEOC acknowledged that it was in privity with the individuals for whom it seeks relief in those cases where the conduct of individuals barred them from

obtaining relief, including cases where individual claims had been previously litigated or settled.

Since *Waffle House*, however, the EEOC has reversed course, taking the position that it is not bound *in any way* by the conduct of individuals for whose benefit it seeks individual relief. In doing so, the EEOC has begun to use *Waffle House* for a proposition that it initially conceded was not even an issue in the case. *See id.* ("This case *does not present* any question regarding the effect of a prior private settlement or judgment between employer and employee on a later public enforcement action.") (emphasis added). In other words, the EEOC now cites *Waffle House* for the proposition that an employee's prior conduct, whether involving a settlement, waiver, or default of claims, has *no bearing* on a subsequent enforcement action by the EEOC. *See* Brief in Opposition to Defendant's Motion for Partial Summary Judgment at 7, *EEOC v. Sidley Austin Brown & Wood LLP*, 406 F. Supp. 2d 991 (N.D. Ill. Dec. 20, 2005) (No. 05 cv 0208) (arguing that *Waffle House* established that "the EEOC can seek victim-specific relief even if the individual victims are barred from seeking relief on their own behalf").

In fact, this has become the EEOC's standard position in litigation. In *Senich v. American-Republican, Inc.*, for example, the question before the court was whether the EEOC could seek individual-specific relief under the ADEA for five individuals who each had signed a waiver and release in exchange for receiving severance payments. 215 F.R.D. 40, 42 (D. Conn. 2003). The EEOC argued that the waivers did not preclude it from seeking such relief. *See id.* Although it did not dispute that the line of cases prior to *Waffle House* would have barred it from pursuing victim-specific remedies on behalf of these employees, the EEOC contended that the *Waffle House* decision "undermine[d] the reasoning" applied in those cases. *Id.* (internal quotation marks omitted). As such, it invited the *Senich* court to "find

that *Waffle House* [was] applicable to cases, such as this, where an employee signs a waiver or release." *Id.* at 44.

The EEOC's reading of *Waffle House* in *Senich* thus represented a clear departure from its pre-*Waffle House* belief that in cases where "an individual . . . has signed a waiver agreement or otherwise settled a claim . . . the employer will be shielded against any further recovery," EEOC Enforcement Guidance, *available at* http://www.eeoc.gov/policy/docs/waiver.html (last visited July 20, 2006), and its representation to this Court in *Waffle House* that "the question presented is not one of res judicata or mootness, but rather whether [the employee's] mere choice of an arbitral forum for litigating his private claims is binding on the EEOC when it seeks victim-specific relief in a public enforcement action," Brief for the Petitioner at 38 n.13, *Waffle House*, 534 U.S. 279 (No. 99-1823). Unlike the arbitration agreement in *Waffle House*, the waiver in *Senich* did not involve a choice of forum. On the contrary, the waiver merely foreclosed further action against the employer in exchange for a severance package. *Senich*, 215 F.R.D. at 42. By arguing that *Waffle House* was applicable, not only to arbitration agreements but to waivers as well, the EEOC thereby sought to enlarge the scope of the holding in *Waffle House* well beyond the limited question presented to and addressed by this Court.

The EEOC is now seeking to go even further. In this case, the EEOC argues that it may obtain monetary relief under the ADEA on behalf of individuals who defaulted on their claims by not filing a charge of discrimination at all. This is so because, according to the EEOC, its right to recover in no way depends on the legal rights of the individuals for whom it seeks relief. *See* Brief in Opposition to Defendant's Motion for Partial Summary Judgment at 7, *Sidley Austin*, 406 F. Supp. 2d 991 (No. 05 cv 0208) ("[T]he EEOC can seek victim-specific relief even if the individual victims are barred from seeking relief on their own behalf."). Given the EEOC's expansive interpretation of its own statutory

powers, cases like the one at bar will continue to arise until this Court clearly confirms its precise holding in *Waffle House* and affirmatively establishes whether and in what circumstances the EEOC may obtain individual-specific relief for individuals who themselves have no claims at law.

This Court's review is particularly necessary given that this is not an isolated case of EEOC action. *See EEOC v. Northlake Foods, Inc.*, 411 F. Supp. 2d 1366, 1367 (M.D. Fla. 2005) (noting that the EEOC refused to dismiss its individual-specific claims until the defendant agreed to disclose the settlement amount). Rather, it is part and parcel of a campaign by the EEOC to arrogate to itself the power to litigate on behalf of individuals without regard to their conduct or legal rights, thereby effectively undoing voluntary settlements to which the directly interested parties have expressly agreed. Neither the ADEA, nor this Court's caselaw, nor common sense supports the EEOC's position. This Court's review is thus essential to stem the tide of uncertainty that threatens to engulf both courts and businesses as the EEOC continues to push for an expansive reading of *Waffle House*.

4. Without this Court's immediate intervention, the far-reaching interpretation of *Waffle House* advocated by the EEOC and adopted by the Seventh Circuit will adversely affect the national business environment by injecting greater uncertainty into business decisionmaking. Most notably, if the Seventh Circuit's holding stands, then businesses will no longer be able to settle disputes with the necessary certainty that the underlying claim will be put to rest. Indeed, to the extent that the EEOC is not "in privity with the victims for whom it seeks relief," Pet. App. 3a, any settlement agreement between a business and an aggrieved individual will merely be a precatory cessation of litigation, since the EEOC could simply resume litigation on behalf of the individual at any time. Such a perverse approach would "allow the EEOC to reduce [a settlement] agreement to all

but a nullity." *See Waffle House*, 534 U.S. at 309 (Thomas, J., dissenting, joined by Rehnquist, C.J., Scalia, J.).

In holding that the EEOC's right to recover in no way depends on the legal rights of the individuals for whom it seeks relief, the Seventh Circuit's decision also effectively strips employers of their expectation interest in finality achieved through settlement agreements. "Where there is reason to believe the settlement would not preclude any later litigation, the defendant's incentive to settle may be severely undercut." Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 615 n.112 (2005). In other words, "[b]ecause settling defendants typically seek to put the entire litigation behind them once and for all, they will have less incentive to settle if they know that they may still be held liable for extensive litigation fees caused by possible [future] challenges." Jean R. Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs*, 17 N.Y.U. REV. L. & SOC. CHANGE 535, 606 (1990). This lack of finality will therefore discourage the speedy and predictable settlement of discrimination cases by removing an important incentive to settle a case—that is, the incentive to foreclose any further litigation.

Indeed, this was the problem that some members of this Court highlighted in *Waffle House* itself. *See Waffle House*, 534 U.S. at 312 (Thomas, J., dissenting, joined by Rehnquist, C.J., Scalia, J.) (arguing that the EEOC's ability to seek individual-specific relief on behalf of employees who have already settled their claims "would discourage employers from entering into settlement agreements and thus frustrate Congress' desire to expedite relief for victims of discrimination"). And it was to foreclose this objection that this Court made clear that it was *not* addressing the "question whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek." *Id.* at 297. The problem that this Court attempted to avoid, however, will only grow more

troublesome unless and until this Court confirms *Waffle House*'s precise holding.

a. *First*, by impeding the settlement process, the Seventh Circuit's decision, if left undisturbed, will dramatically decrease employers' willingness to settle employment discrimination claims, which will, in turn, produce greater litigation expenses, more unpredictability, less privacy, and lower employee morale. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1350-51 (1994) (listing a number of benefits ranging from party satisfaction to cost-savings that result from settlement agreements); *see also* Rachel H. Yarkon, Note, *Bargaining in the Shadow of the Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising from Termination of Employment*, 2 HARV. NEGOT. L. REV. 165, 168-72 (1997) (discussing the benefits for both parties of a negotiated settlement in the employment discrimination context).

Prior to the Seventh Circuit's decision, the threat of multiple exposure to individual-specific liability was not even a consideration in settlement decisions. Under the Seventh Circuit and EEOC's view of *Waffle House*, however, businesses must now consider this threat in *all* settlement situations. This, then, dramatically increases the very uncertainty that settlements aim to eliminate—the uncertainty of future litigation costs and potential damage awards. The Seventh Circuit and EEOC's rationale also increases the costs of settlement more generally, because under it businesses must expend more time and resources to gather and process information concerning which claims they should settle and how they should settle those claims. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 17 (6th ed. 2003) (explaining that information costs are divided into two categories—the cost of acquiring information and the cost of absorbing or processing information). For instance, based on the size of the claim, the complexity of the legal issues, the potential merit of the claim, and the

perceived likelihood of post-settlement intervention by the EEOC, a business could elect not to settle, or it could offer a lower settlement payout in anticipation of subsequent EEOC litigation. Each option presents different costs and benefits for which the business must now acquire additional information in order to make a sound settlement decision.

Nor does the fact that the EEOC ultimately will file suit in a relatively small percentage of cases undermine the impact that the Seventh Circuit and EEOC's view will have on settlements. *Ex ante*, no employer will know whether or not its settlement will later be scuttled by a separate EEOC suit seeking recovery of individual-specific relief. Perhaps more importantly, settlement is the most useful option for the subset of claims that may have merit or for which the merit is uncertain. This, however, is precisely the class of claims for which EEOC intervention is the most likely. Thus, the impact of this erroneous and expansive understanding of *Waffle House* will indeed be substantial and recurring.

In short, if allowed to stand, the Seventh Circuit and EEOC's broad interpretation of *Waffle House* will greatly increase the cost of and uncertainty surrounding settlements and, concomitantly, will reduce an employer's incentive to settle. This will in turn undermine the very structure of the federal anti-discrimination laws, which, as discussed further below, are specifically designed to *promote* the amicable resolution of employment discrimination claims.

b. *Second*, the Seventh Circuit's decision will have adverse consequences not only for countless businesses but also for aggrieved individuals who rely on settlements to obtain meaningful and timely relief without unnecessary expense and hardship. Employment discrimination claims "are time consuming, expensive to litigate, highly individualistic, and labor intensive. They are certain to draw vigorous defenses from experienced counsel for employers who often possess superior resources." Louis S. Rulli, *Employment Discrimination Litigation Under the ADA from*

the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers in the Next Decade?, 9 TEMP. POL. & CIV. RTS. L. REV. 345, 381 (2000). Indeed, because comparatively few of these cases go to trial, "plaintiffs are most likely to achieve success through negotiated settlements." *Id.*; *see also id.* at 368-73 (examining all ADA Title I cases in the Eastern District of Pennsylvania from 1996 to 1998 and concluding that the win rate for plaintiffs in cases decided by judges or juries approximated only 2.7%, whereas 47% to 63% of the cases settled with some benefits to the plaintiffs); David M. Trubek, *et al.*, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 122 (1983) ("[B]argaining and settlement are the prevalent and, for plaintiffs, perhaps the most cost-effective activity that occurs when cases are filed."). By discouraging businesses from negotiating settlement agreements, the decision below threatens to deprive plaintiffs of the most cost-effective means of obtaining relief.

c. *Finally*, should the Seventh Circuit's decision stand, the impact on the business community as a whole cannot be overstated given that the decision below implicates virtually every federal employment discrimination dispute in the Nation.

The Seventh Circuit and EEOC's rationale is not limited to the ADEA, but rather, extends to other anti-discrimination statutes enforced by the EEOC, including Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-5(a), and Titles I and V of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12117(a).[3] *See In re Bemis Co.*, 279 F.3d 419, 422 (7th Cir. 2002) (applying *Waffle House* to an EEOC action under Title VII); *see also* Brief in Opposition to Defendant's Motion for Partial

[3] *See also* U.S. Equal Employment Opportunity Comm'n, Federal Equal Employment Opportunity (EEO) Laws, *available at* http://www.eeoc.gov/abouteeo/overview_laws.html (last visited July 20, 2006) (explaining various statutes enforced by the EEOC).

Summary Judgment at 9, *Sidley Austin*, 406 F. Supp. 2d 991 (No. 05 cv 0208) (arguing that *Waffle House* applies not only to the ADA but to both the ADEA and Title VII as well).

In light of this, the implications of the Seventh Circuit's ruling are staggering. In fiscal year 2005 alone, employees filed a total of 75,428 discrimination charges with the EEOC, the vast majority of which alleged discrimination prohibited by Title VII, the ADA, or the ADEA. *See* U.S. Equal Employment Opportunity Comm'n, Charge Statistics: FY 1992 Through FY 2005, http://www.eeoc.gov/stats/charges.html (last visited July 20, 2006). Employees filed 16,930 employment discrimination cases in federal district court during the same period. ADMIN. OFFICE OF THE U.S. COURTS, U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 159 tbl.C-2 (2005), *available at* http://www.uscourts.gov/judbus2005/contents.html (last visited July 20, 2006). However, during 2005, only 3.5% of federal employment discrimination suits between private parties filed in federal district court ever made it to trial. ADMIN. OFFICE OF THE U.S. COURTS, U.S. DISTRICT COURTS—CIVIL CASES TERMINATED, BY NATURE OF SUIT AND ACTION TAKEN, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 183 tbl.C-4 (2005), *available at* http://www.uscourts.gov/judbus2005/contents.html (last visited July 20, 2006). The impact of the decision below on the resolution of thousands of employment discrimination suits, therefore, simply cannot be discounted or ignored.

II. THE SEVENTH CIRCUIT'S DECISION THWARTS A CONGRESSIONAL SCHEME DESIGNED TO ENCOURAGE SETTLEMENT OF DISPUTES AND CESSATION OF LITIGATION

As reflected in these practical effects, the decision below also clearly thwarts a congressional scheme designed to encourage the prompt resolution of employment

discrimination claims. Because settlement is the preferred form of resolving employment discrimination disputes, this Court's review is also warranted to advance Congress's goal of "encouraging voluntary settlement of employment discrimination claims." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).

Congress's stated purpose for the ADEA is "to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). Settlement encourages that purpose. The statute thus requires that "[b]efore instituting any action under this section, the Equal Employment Opportunity Commission *shall* attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(b) (emphasis added); *see also id.* § 626(d) ("Upon receiving such a charge, the Commission . . . *shall* promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.") (emphasis added).

The plain implication of this regulatory regime is that the EEOC *cannot* and *should not* pursue litigation until it has first attempted to orchestrate a settlement through an informal conciliation process. For all of the reasons discussed, however, the rationale undergirding the Seventh Circuit's decision frustrates and discourages settlement. It thus contravenes the overarching statutory purpose of the ADEA "to help *employers and workers*," 29 U.S.C. § 621(b) (emphasis added), find their own way to resolve age discrimination disputes.

* * *

The decision below effectively strips employers and employees of their expectation interest in finality achieved through settlement agreements or other judgments. The reach of this decision, moreover, extends beyond the ADEA

to other federal employment discrimination laws enforced by the EEOC. Thus, the impact of the decision below upon the business community cannot be understated: The EEOC and Seventh Circuit's view of *Waffle House* threatens to undermine the very basis upon which thousands of federal anti-discrimination claims are resolved each and every year. Because the Seventh Circuit's rationale threatens to encumber businesses operating not only under the ADEA but under various other federal statutes and to thwart a carefully crafted congressional plan to encourage the prompt resolution of employment disputes, this Court's review is immediately warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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